

C1/2016/0841

Neutral Citation Number: [2016] EWCA Civ 1417
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, PLANNING COURT
(MR JUSTICE HOLGATE)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 15 December 2016

B e f o r e:

LORD JUSTICE JACKSON

Between:
HEADCORN PARISH COUNCIL

Applicant

v

**SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT &
ORS**

Respondents

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(Official Shorthand Writers to the Court)

Mr R Buxton (instructed by Richard Buxton Environmental and Public Law) appeared on behalf of the **Applicant**

Mr S Morgan appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)
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1. LORD JUSTICE JACKSON: This is an application for permission to appeal.
2. The facts giving rise to this application are as follows. As any judge who has sat in Maidstone courts knows, the A229 road runs south from Maidstone passing Boughton Monchelsea where the judge's lodgings are located, or at least were in the past. Another road which leads into the A229 is the A274 road. The A274 joins the A279 at the Wheatsheaf junction. Some way down the A274, I think some 15 kilometres south of Maidstone, is the village or settlement of Headcorn.
3. Crabtree and Crabtree (Headcorn) Limited, to which I shall refer as Crabtree, wished to develop land in the village of Headcorn by constructing 220 houses there. They applied for outline planning permission to the Maidstone Borough Council.
4. The Headcorn Parish Council objected to that proposed development and considered that it would have an adverse impact on the environment. They asked the Metropolitan Borough Council to carry out an Environmental Impact Assessment. The Maidstone Borough Council declined to do so, taking the view that one was not necessary.
5. The Parish Council then wrote to the Secretary of State and asked him to call the matter in and to consider whether an Environmental Impact Assessment was necessary. The Secretary of State duly considered the matter. The Secretary of State produced a written decision on 9 October 2015 to the effect that an Environmental Impact Assessment was not necessary. That written decision set out its reasons and was accompanied by an environmental impact screening analysis, which helpfully set out the Secretary of State's thought process in greater detail.
6. The Maidstone Borough Council granted outline planning permission for the development which Crabtree desired on 13 November 2015. Headcorn Parish Council took the view that this was not satisfactory. Accordingly, the Parish Council issued judicial review proceedings on 23 December 2015 challenging the Secretary of State's decision in relation to environmental impact.
7. The essence of the Parish Council's case is that the Secretary of State failed to take into account strong concerns expressed by Mrs Cooper. Mrs Cooper is the head of the Kent County Council's Growth, Environment and Transport Department. She had expressed concerns about developments taking place along the A229 road and the A274 road because of the increased traffic which such developments cumulatively would generate and in particular, the congestion which this would cause at Wheatsheaf junction. Mrs Cooper's concerns are expressed in a number of letters, including one dated 20 January 2015 and one dated 13 August 2015.
8. The Secretary of State served an acknowledgment of service contesting the Parish Council's claim. Crabtree and the Maidstone Borough Council, who were named as Interested Parties, also served acknowledgments of service contesting the claim.

9. Following refusal of permission on the papers, there was an oral hearing before Holgate J on 17 February 2016. The judge refused permission to pursue the judicial review claim. In paragraphs 18 to 25, the judge said this:

"18. There was no suggestion from the County Council at that stage or by the Borough Council that the traffic generated by this development would have any significant effect whatsoever on roads which could be described as the southern approaches into Maidstone. The court has been told that Maidstone is about 15 kilometres to the north of Headcorn or about 9 miles. There has been no suggestion that the officer's report misrepresented in any material way the May 2015 consultation response by the County Council.

19. In his letter of 13 August 2015, Dr Ker had certainly criticised the transport assessment, although it strikes me that on any fair reading he was raising mainly localised issues as opposed to strategic objections.

20. In his email of 19 August 2015, Dr Ker relied upon the letter sent by Kent County Council to Maidstone on 13 August 2015 as representing a significant change in the County Council's position which he asked the Secretary of State to take into account. It is plain that on any fair reading of the Council's letter the context for the views it set out was the Borough Council's draft strategic housing policies in an emerging local plan. The letter was accompanied by a technical note on traffic modelling dated 11 August 2015. It can be seen that the County Council were considering the Borough Council's proposal to provide an additional 18,500 houses in the Maidstone area as a whole and in particular 2,250 houses in the south east part of Maidstone.

21. Having carried out additional traffic modelling, the letter said:

i. "The modelling has identified how conditions on the highway network would be adversely affected by the cumulative impact of traffic associated with planning and development. In particular routes within south east Maidstone including the A229 and A274 have been shown to be highly susceptible to worsening levels of congestion *within south east Maidstone.*" (emphasis added)

22. Reference also was made to the potential adverse effects on one junction which was described as crucial, namely the Wheatsheaf junction.

23. It was in that context that the County Council expressed its strong objection to any further major development allocations or speculative applications on "the southern approaches to Maidstone town centre".

24. No evidence has been provided to the court that the County Council has sought at any stage to alter its consultation response in May 2015 to this particular proposal for 220 homes in the village of Headcorn, whether

viewed by itself or cumulatively with other proposals. The County Council plainly had the opportunity to do this between its strategic letter in August 2015 and the issuing of planning permission in November 2015.

25. There is no evidence either that the County Council ever considered that the proposals for 220 houses in Headcorn would have implications for that part of the A274 which could be said to lie "within south east Maidstone" or to affect the Wheatsheaf junction. It does not appear either that the Parish Council contacted the County Council to see whether the County Council's views as recorded in the officer's report for the July meeting had altered."

In paragraph 30 of his judgment, the judge said this:

"In my judgment, it is unarguable that the Secretary of State erred in law in this respect. The nature of the material relied upon by the Claimant is perfectly clear. The County Council were raising strategic concerns with regards to a draft policy proposal to locate 2,250 houses in south east Maidstone and the effects that that would have on roads in the south eastern part of Maidstone. There is no evidence at all before the court to link that concern with a development for 220 houses on a site lying to the south of Maidstone but some 15 km distant."

10. The Parish Council was aggrieved by the judge's decision and applied for permission to appeal to the Court of Appeal. Elias LJ refused that application on paper. The Parish Council applied for a renewed oral application. That hearing takes place today.
11. Mr Richard Buxton, the solicitor for the Parish Council, presents the Applicant's case. He took me through the correspondence. He has demonstrated, as it seems to me, that the correspondence from Mrs Cooper is not limited to developments within or close to the boundaries of Maidstone. Mrs Cooper's concern appears to have been about the cumulative effect of housing developments along the A274 and the A229 roads to the south of, in other words before they converge at, the Wheatsheaf junction. There is, so far as I can see, no reference in the Secretary of State's screening analysis or in his decision to those letters or to the specific concerns which Mrs Cooper expresses.
12. I hasten to say that I am not expressing any final view on this matter. This is an ex parte application made on behalf of the Parish Council, although at my request counsel for Crabtree has drawn my attention to one or two relevant documents. Suffice it to say that I am certainly not saying that the proposed judicial review proceedings will succeed. That will be a matter for decision after full argument.
13. I am, however, persuaded that there is a serious point which merits going forward to full judicial review proceedings. There is, in my view, arguably an error in the judge's analysis at paragraphs 18 to 30 of his judgment.

14. The next question is a procedural one. Mr Morgan, counsel for Crabtree, who as I say is here today to assist the court in the event that any such assistance is required, has assisted on this issue. Both advocates agree that the present application falls within rule 52.15, not rule 52.15B of the Civil Procedure Rules. We have had a helpful discussion about the procedure.
15. I propose to exercise my powers under rule 52.15(3) to grant permission to apply for judicial review. I direct that the judicial review proceedings should go forward in the Administrative Court, not in the Court of Appeal.
16. Mr Buxton wishes to rely on certain correspondence from the Council which postdated the judge's decision. There has been some argument in correspondence about how Ladd v Marshall applies to that matter. In my view, the Ladd v Marshall issue is irrelevant because there is no question at this stage of fresh evidence being called before the Court of Appeal.
17. Mr Morgan very properly draws my attention to the fact that a Claimant should lodge his evidence in judicial review proceedings at the outset. I accept that. On the other hand, correspondence which has come into existence after the commencement of the judicial review proceedings but before permission to pursue the claim was finally obtained, if it is relevant, should clearly be before the court. So if permission is necessary, I give permission to the Applicant to rely in evidence upon the further correspondence which Mr Buxton seeks to put forward.
18. Finally, I put on record Mr Buxton's assurance that the Parish Council have no wish to procrastinate. They will cooperate with the other parties in pursuing this litigation expeditiously.